

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1-1-1993

## Civil Practice

Jay C. Carlisle

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Procedure Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Jay C. Carlisle, Civil Practice, 44 Syracuse L. Rev. 65 (1993), <http://digitalcommons.pace.edu/lawfaculty/24/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# CIVIL PRACTICE

Jay C. Carlisle†

## INTRODUCTION

During the 1992 *Survey* year, “new” legislation was enacted which fundamentally changes the procedure for commencement of some lawsuits.<sup>1</sup> Effective December 31, 1992, all civil actions in supreme and county courts must be commenced by filing a summons and complaint or summons with notice.<sup>2</sup> Several important amendments to the Civil Practice Law and Rules (“CPLR”) were enacted<sup>3</sup> and effective January 1, 1993, new IAS<sup>4</sup> and escrow check bouncing<sup>5</sup> rules became effective. Additionally, there have been significant developments in the decisional law of statute of limitations,<sup>6</sup> discovery,<sup>7</sup> sanctions,<sup>8</sup> and the legal profession<sup>9</sup>. These and other areas should be of interest to the bench and bar.

---

† Professor of Law, Pace University School of Law; Adjunct Professor of New York Civil Practice, Fordham Law School and New York Law School; J.D., University of California at Davis; A.B., University of California at Los Angeles; Member, New York Bar.

This article is dedicated to Professor Hervey M. Johnson and to Jeffrey Brown, Esq. Both died during the 1992 *Survey* year. Professor Johnson was a founding member of the Pace University School of Law faculty. He graduated from Princeton and was an editor of the Duke Law Review prior to practicing law as an associate at the New York firm of Davis, Polk & Wardwell. Hervey was a wonderful law teacher and our students consistently rated him as one of our best professors. His courses in Constitutional Law and Contracts were favorites of thousands of Pace Law School students. Jeff Brown was an outstanding law student at Pace Law School and an outstanding lawyer at the New York City law firm of Sullivan & Cromwell. Jeff was the chief assistant to Robert Macrate when he was president of the American Bar Association. The fact that Jeff died so soon after his graduation from law school reminds us that life is fragile. The students, faculty, deans and alumni of Pace Law School salute Hervey Johnson and Jeff Brown. We miss them very much.

1. See *infra* notes 62-99 and accompanying text.
2. See *infra* note 66 and accompanying text.
3. See *infra* notes 35-44 and accompanying text.
4. See *infra* notes 12-23 and accompanying text.
5. See *infra* notes 24-28 and accompanying text.
6. See *infra* notes 100-188 and accompanying text.
7. See *infra* notes 238-240 and accompanying text.
8. See *infra* notes 261-295 and accompanying text.
9. See *infra* notes 296-311 and accompanying text.

## I. NEW LEGISLATION AND RULES

Space limitations prevent inclusion of an appendix summarizing all CPLR legislation enacted during the *Survey* year. The reader should review the table of contents for the various CPLR publications.<sup>10</sup> The most important change is the adoption of a new filing law for all civil actions in supreme and county courts.<sup>11</sup> Prior to discussing these changes, the bench and bar should be alerted to the following statutory and rule changes.

A. *New IAS Rules Effective January 1, 1993*

A series of changes in rules and operations of the Individual Assignment System ("IAS") became effective January 1, 1993.<sup>12</sup> The changes will provide judges with more case-management powers<sup>13</sup> and encourage them to experiment with IAS rules.<sup>14</sup> The new rules require that preliminary conferences occur within forty-five days of the filing of a request for judicial intervention, unless the parties complete and submit an agreed upon discovery schedule on a form order prior to the conference.<sup>15</sup> Also, unless the judge determines that circumstances require settlement or an order, decisions will be self-effectuating in nature.<sup>16</sup> The rules and operational changes recommended will be implemented in accordance with plans submitted by the administrative judges and approved for each judicial district in the

---

10. The complete text should be available for review in the 1992-93 publications by Matthew Bender ("The Red Book"), Gould Publications ("The Black Book") or West's McKinney Commentaries. Copies of the entire legislative texts may be obtained by contacting the Department of Governmental Relations. The practitioner should also consider subscribing to the Annual Legislative Bulletin of the Association of the Bar of the City of New York. The Bulletin analyzes the merits of the proposed bills and discusses their impact on current laws. It is an excellent research tool and will keep the reader abreast of current developments in Albany.

11. See *infra* note 66 and accompanying text.

12. See N.Y. COMP. CODES R. & REGS. tit. 22, § 208.8 (effective Jan. 1, 1993) (amending § 202.8 of the Uniform Civil Rules for the supreme and county courts, relating to motion procedure).

13. See Martin Fox, *Rules Changes for IAS System Effective Jan. 1*, N.Y. L.J., Dec. 14, 1992, at 1.

14. *Id.* at 2. (Chief Administrator of the Courts Matthew T. Crosson states the changes "will increase the court system's ability to deal with the overwhelming number of matters that come before it every day . . . [and] will also serve to strengthen the Individual Assignment System by making case processing procedures more uniform and understandable."

15. N.Y. UNIFORM RULES OF THE COURT § 202.12(b) (McKinney 1993).

16. *Id.*

state.<sup>17</sup> Plans have been made for an IAS Committee "to monitor and review the progress and effectiveness" of the new rules on a regular basis and to issue its first monitoring report on or before May 1, 1993.<sup>18</sup> Operational changes include informal motion practices such as telephone conferences,<sup>19</sup> the development of specialized commercial<sup>20</sup> and matrimonial parts,<sup>21</sup> block conference scheduling,<sup>22</sup> and refinement of existing methods of trial assignment.<sup>23</sup> Copies of the implementation plans for each judicial district should be obtained by members of the bar.

### *B. New Escrow Check Bouncing Rules*

During the *Survey* year important amendments to rules and regulations governing the maintenance of lawyer trust and escrow bank accounts have been enacted.<sup>24</sup> Among the changes, which are effective January 1, 1993, are amendments to Disciplinary Rule ("DR") 9-102 of the Lawyers' Code of Professional Responsibility.<sup>25</sup> The new rules require that attorneys and law firms use only banks that have agreed to report dishonored checks to attorney disciplinary committees.<sup>26</sup> The rules are applicable to special, trust, escrow, and IOLA accounts. The Lawyers' Fund for Client Protection will periodically publish a list of participating banks. There will be three designations for client

---

17. Plans for the Ninth Judicial District and for the First Judicial District have already been published and distributed to the bar. (Copies on file with the Syracuse Law Review in the Barclay Law Library).

18. See Fox, *supra* note 13, at 2.

19. *Id.*

20. *Id.*

21. *Id.* "The use of specialized parts will increase, particularly with the establishment of four specialized commercial parts in New York County on Jan. 1, and the addition of more specialized parts exclusively for matrimonial cases."

22. Cases will be scheduled for conferences in blocks of time at intervals during the day. This will decrease waiting time for lawyers and litigants and will replace the former method of scheduling, where a large number of cases were scheduled to be heard at the same time on a single day.

23. See Fox, *supra* note 13, at 2. "Based on a district-by-district review of current caseloads, administrative judges, on an approved local option basis, will adopt or refine existing methods of trial assignment, including dual-track (the assignment of back-up judges for trial-ready cases if the IAS judge is unavailable) and the use of Trial Assignment Parts (in which all trial-ready cases are pooled and sent out to available judges for trial)."

24. See STATE BAR NEWS, December 1992, at 12, col.1.

25. N.Y. DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1993).

26. See STATE BAR NEWS, *supra* note 24, at 12.

and escrow accounts. Attorneys and law firms must choose one for each account and have the title placed on their checks and deposit slips. The titles are "Attorney Trust Account," "Attorney Special Account," and "Attorney Escrow Account."

The new escrow rules provide for a dishonored check notice procedure.<sup>27</sup> If a check written on one of the designated accounts bounces for lack of funds, a notice will be sent by the bank to the Lawyers' Fund for Client Protection. The Fund will hold the check for ten days in case the notice was sent in error by the bank. Even if the lawyer deposits money to cover the check, the notice won't be withdrawn unless the bank was in error. Finally, after expiration of the ten day period, the Fund will forward the notice to the appropriate disciplinary committee, based on the attorney or law firm's address. The Committee will then conduct an investigation and may order an audit.<sup>28</sup>

### C. *Attorney Fees Against the State*

The New York State Equal Access to Justice Act was permanently enacted during the *Survey* year.<sup>29</sup> The law creates a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the State of New York. It is similar to the provisions of federal law contained in 28 U.S.C. section 2412(d) and the significant body of case law that has evolved thereunder. Awards are limited to cases where the state cannot show that its position is "substantially justified."<sup>30</sup> Fees will be determined pursuant to prevailing market rates for the kind and quality of the services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.<sup>31</sup>

---

27. *Id.*

28. *Id.*

29. See Act of March 31, 1992, ch. 36, 1992 McKinney's Sess. Laws of N.Y. 61 (codified at N.Y. STATE EQUAL ACCESS TO JUSTICE ACT §§ 1, 2 (McKinney Supp. 1992)).

30. *Id.* See also *Pierce v. Underwood*, 487 U.S. 552 (1988) (fees under similar federal statute could be awarded only if an agency had proceeded when there was no fair ground for litigation).

31. See Act of March 31, 1992, *supra* note 29. See also Gary Spencer, *Cuomo Signs Bill Authorizing Awards of Fees Against State*, N.Y. L.J., Oct. 27, 1989, at 1.

*D. Recovery of Attorney Fees and Damages in SLAPP Suits*

Effective January 1, 1993, a new section 70-a has been added to the New York State Civil Rights Law.<sup>32</sup> This authorizes claimants who are subject to a SLAPP suit to claim costs, attorney fees, other compensatory damages, and punitive damages. A claimant must fit within the definitional section of section 76-a of the Civil Rights Law.<sup>33</sup>

*E. Civil Justice Expense and Reduction Plans*

We again remind federal litigators that new civil justice expense and reduction plans were enacted several weeks prior to the beginning of the 1992 *Survey* year. On December 12, 1991, the Civil Justice Expense and Delay Reduction Plan was adopted by the Board of Judges of the Southern District of New York. On December 17, 1991, a similar plan was adopted by the Board of Judges of the Eastern District of New York. The plans were discussed in last year's *Survey of Civil Practice*.<sup>34</sup> Copies of the plans are available in the appropriate federal court clerk's office and are "must reading" for anyone contemplating litigation in the Eastern or Southern Districts.

*F. Significant CPLR Changes*

During the *Survey* year there were thirty-six section or rule changes to the CPLR. Some of the important changes are listed below. The practitioner is reminded to review the table of contents for the various CPLR publications to note changes that may be relevant to his areas of interest.<sup>35</sup>

*1. CPLR 213-b*

CPLR 213-b was added to provide that a crime victim may commence a civil action for damages against a person convicted of a crime within seven years of the date of the crime. This provision became effective on July 24, 1992.<sup>36</sup>

---

32. See Act of August 3, 1992, ch. 767, 1992 McKinney's Sess. Laws of N.Y. 2103 (codified at N.Y. CIV. RIGHTS § 70-a (McKinney Supp. 1992)).

33. *Id.* (codified at N.Y. CIV. RIGHTS § 76-a (McKinney Supp. 1992)).

34. See Jay C. Carlisle, *Civil Practice, 1991 Survey of N.Y. Law*, 43 SYRACUSE L. REV. 77, 96-101 (1992).

35. See *supra* note 10.

36. N.Y. CIV. PRAC. L. & R. 213-b (McKinney Supp. 1992).

## 2. *CPLR 214-c(1)*

CPLR 214-c(1) was amended to broaden the definition of "exposure" to include exposure by implantation. The amendment became effective on July 24, 1992, and is good news for plaintiffs who seek to use New York's new discovery accrual statute of limitations in substance cases.<sup>37</sup>

## 3. *CPLR 307(2)*

CPLR 307(2) was amended to add a provision authorizing personal service upon specified state agency officers by certified mail, return receipt requested. The provision became effective January 1, 1993, and requires that the envelope containing process bear the legend "URGENT LEGAL MAIL."<sup>38</sup> Failure to strictly comply with the statute may result in a dismissal in supreme and county courts. Dismissal in the inferior courts will be for lack of jurisdiction and if the statute of limitations has run, the action will be time-barred.<sup>39</sup>

## 4. *CPLR 3405*

CPLR 3405 was amended to provide that the rules promulgated by the Chief Judge of the Court of Appeals for the arbitration of certain claims may authorize use of judicial hearing officers as arbitrators. The rule became effective April 10, 1992.<sup>40</sup>

## 5. *CPLR 3407*

CPLR 3407 relates to preliminary conferences in personal injury actions involving certain terminally ill parties. It was enacted by chapter 582 of the Laws of 1992 and became effective September 1, 1992. Lawyers representing clients who are terminally ill and who allege their illness is the result of the culpable conduct of another party to the action "may request an expedited preliminary conference."<sup>41</sup>

---

37. N.Y. CPLR 214-c(1) (McKinney Supp. 1993).

38. N.Y. CPLR 307(2) (McKinney Supp. 1992).

39. *Id.*

40. See Act of April 10, 1992, ch. 55, 1992 N.Y. Laws 55 (codified at N.Y. CPLR 340(s)(2) (McKinney Supp. 1992)).

41. See Act of July 24, 1992, ch. 582, 1992 McKinney's Sess. Laws of N.Y. 1614 (codified at N.Y. CPLR 3407 (McKinney Supp. 1992)).

## 6. CPLR 87

Effective April 10, 1992, Chapter 55 of the Laws of 1992 added Article 87 to the CPLR.<sup>42</sup> The provisions of the Article shall expire and be deemed repealed on April 1, 1994.<sup>43</sup> The new provision is entitled "Punitive Damage Awards: Public Share." It provides that in any civil action resulting in an award of punitive damages to a private party, other than an award rendered against the state, upon expiration of the time to appeal or the exhaustion of available appeals, twenty percent of such punitive damages award shall be payable to the state, and the judgment shall order payment accordingly.<sup>44</sup>

### G. The New Filing Law

During the *Survey* year a new mandatory filing law was enacted for civil actions commenced in supreme and county courts after December 31, 1992.<sup>45</sup> The legislation includes changes in CPLR 203, 205, 207, 304, 305, 306-a, 306-b, 312-a, 1007, 1101, 1319, 6213, and 7102. It also provides for changes in the Uniform District Court Act,<sup>46</sup> the New York Civil Court Act,<sup>47</sup> the Uniform City Court Act,<sup>48</sup> the Uniform Justice Court Act,<sup>49</sup> the Domestic Relations Law,<sup>50</sup> the General Municipal Law,<sup>51</sup> the Navigation Law,<sup>52</sup> the Parks, Recreation and Historic Preservation Law,<sup>53</sup> and the Vehicle and Traffic Law.<sup>54</sup> Professor Siegel,<sup>55</sup> Professor Arkin,<sup>56</sup> Professor

---

42. See Act of April 8, 1992, ch. 55, 1992 McKinney's Sess. Laws of N.Y. 324 (codified at N.Y. CPLR 8701-8704 (McKinney Supp. 1992)).

43. *Id.*

44. *Id.*

45. Act of June 23, 1992, ch. 216, 1992 McKinney's Sess. Laws of N.Y. 835 (codified at N.Y. CPLR 306-b (McKinney Supp. 1992)).

46. N.Y. UNIFORM DIST. CT. ACT § 401, *et seq.* (McKinney 1989 & Supp. 1992).

47. N.Y. CITY CIV. CT. ACT § 400 (McKinney 1992 & Supp. 1992).

48. N.Y. UNIFORM CITY CT. ACT §§ 400m, 409m, 411 (McKinney 1989 & Supp. 1992).

49. *Id.* § 400 (McKinney 1989 & Supp. 1992).

50. N.Y. DOM. REL. LAW § 211 (McKinney 1988 & Supp. 1992).

51. N.Y. GEN. MUN. LAW § 504-a (McKinney 1986 & Supp. 1992).

52. N.Y. NAV. LAW §§ 48, 74 (McKinney 1989 & Supp. 1992).

53. N.Y. PARKS REC. & HIST. PRESERV. LAW § 25.27 (McKinney 1984 & Supp. 1992).

54. N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986 & Supp. 1992).

55. See David D. Siegel, *Imminent New Filing System Threatens Viability of Civil Lawsuits*, N.Y. L.J., Dec. 28, 1992, at 1 [hereinafter *Imminent New Filing*]; David D. Siegel, N.Y. ST. L. DIG., Nos. 390, 391, 395 and 396. See also DAVID D. SIEGEL, *NEW YORK PRACTICE* (2d ed. 1991 & Supp. 1992).

Barker,<sup>57</sup> Professor Shapiro,<sup>58</sup> Professor Carpinello,<sup>59</sup> and others<sup>60</sup> have written on the new filing law. In addition Bert Bauman, Esq., and the New York State Trial Lawyers Institute have published a useful "Quick Tip" digest.<sup>61</sup> Professor Farrell, who authored the *Survey of Civil Practice* for ten years prior to the current author, has provided very helpful written comments regarding the legislative changes in rules affecting commencement of actions in supreme and county courts. The new rules are highlighted as follows:

### 1. In General

Prior to July 1, 1992, satisfaction of the statute of limitations was inextricably linked to service of the summons and complaint or summons and notice upon the defendant.<sup>62</sup> Failure to comply strictly with New York service statutes would result in a dismissal for lack of jurisdiction and if the statute of limitations had run, the plaintiff did not get the benefit of a six month extension under CPLR 205(a).<sup>63</sup> Effective September 1, 1991, CPLR 306-a required that the summons and proof of service be filed with the clerk of the court within thirty days after service was complete.<sup>64</sup> The statute applied to actions commenced in the supreme or county courts, including third party actions.<sup>65</sup> It was designed to raise revenue, but many lawyers did not comply with the statute and the legislature was forced to pass Chapter 216 of the Laws of 1992, which establishes mandatory filing require-

---

56. See Marc M. Arkin, New York's New Commencement By Filing Law, Special Alert Available from Matthew Bender (an analysis of practice under Chapter 216 of the Laws of 1992).

57. See Robert A. Barker, *Provisions of The New Filing Law*, N.Y. L.J., July 20, 1992, at 3.

58. See Fred L. Shapiro, *Commencement by Filing Legislation*, 19 WESTCHESTER BAR J. 303 (Fall 1992).

59. See Carpinello, *The Commencement-by-Filing Law* (written remarks before New York State Trial Lawyers Institute) (copy on file in Barclay Law Library).

60. See James N. Blair and Paul H. Aloe, *New Commencement by Filing Law: A Practitioner's Survival Guide*, N.Y. L.J., June 26, 1992, at 1.

61. See Bert Bauman, *New Commencement By Filing Law*, (written remarks before New York State Trial Lawyers Institute) (copy on file in Barclay Law Library) and NYSTLA QUICK TIP (written analysis of commencement of a special proceeding in supreme and county courts of New York) (copy on file in Barclay Library).

62. See Jay C. Carlisle, *Civil Practice, 1989 Survey of N.Y. Law*, 41 SYRACUSE L. REV. 63, 89-94 (1990).

63. See Jay C. Carlisle, *Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 101-108 (1989).

64. See Carlisle, *Civil Practice, 1991 Survey, supra* note 34, at 78.

65. *Id.*

ments for all civil actions in supreme and county courts.<sup>66</sup> The new legislation also seems to apply to actions filed in the surrogate's court,<sup>67</sup> but actions in other courts, including the court of claims, must be commenced by service of process upon the defendant.<sup>68</sup> The new statutory scheme became effective July 1, 1992, and applies to civil actions and proceedings commenced thereafter. There was a transitional provision which permitted commencement of all civil actions by service of process on the defendant until December 31, 1992.<sup>69</sup> If the filing fee required by CPLR 306-a was not paid by December 31, 1992, the "old style" action was deemed dismissed without prejudice. In this respect, the practitioner should note *Metropolitan Property & Casualty Insurance Co. v. Roosevelt*,<sup>70</sup> where Justice Joan Lefkowitz authorized the late filing of a summons because the filing fee had been paid in 1992.<sup>71</sup>

## 2. *Summary of Changes*

### (a) *CPLR 203*

The applicable statute of limitations stops running in supreme and county court civil actions when the summons and complaint or summons and notice is properly filed with the clerk of the court.<sup>72</sup> The plaintiff, or his representative, must pay \$170 for the index fee, obtain a receipt, and be sure the summons indicates the index number assigned and the date of filing. If "circumstances prevent filing," e.g., the clerk's office is closed, new CPLR 203(c)(2) provides that signing of a judge's order will mark commencement of the action if the order is filed within five days.<sup>73</sup> REMEMBER, under the new filing law,

---

66. *See Imminent New Filing*, *supra* note 55, at 1.

67. *See id.*

68. *Id.*

69. *See id.*

70. 154 Misc. 2d 336, 593 N.Y.S.2d 923 (Sup. Ct. Rockland Co. 1993).

71. *Id.* at 336, 593 N.Y.S.2d at 923 (Plaintiff started an action on August 14, 1992, and defendant defaulted. Plaintiff wanted to enter a default judgment but had failed to file the summons and proof of service. Plaintiff had purchased an index number in 1992 and moved for a nunc pro tunc order of filing. The Supreme Court pointed out that prior to December 31, 1992, one could commence an action without filing of summons and complaint or summons and notice with the Supreme Court. The issue was whether plaintiff's application was subject to the new law. Justice Lefkowitz authorized the late filing because the fee was paid in 1992, which met the implicit effective date requirements.).

72. *See* N.Y. CPLR 306-a (McKinney 1990 & Supp. 1992).

73. *See* N.Y. CPLR 203(c)(2) (McKinney 1990 & Supp. 1992).

CPLR 203(b)(5)<sup>74</sup> no longer governs supreme and county court actions but it is applicable in other courts.<sup>75</sup>

*(b) CPLR 205*

CPLR 205 codifies the applicable case law. There is no six month extension if a civil action filed in supreme or county court is dismissed for failure to obtain jurisdiction over the defendant.<sup>76</sup> However, CPLR 306-b(b) allows the plaintiff to commence a second action within 120 days after an automatic dismissal for failure to file "proof of service" or within 120 days after a jurisdictional dismissal.<sup>77</sup>

*(c) CPLR 304*

An action in the supreme or county court is commenced by the filing of a summons and complaint or summons with notice with the clerk of the court.<sup>78</sup> A special proceeding is commenced by filing of a notice of petition or order to show cause with the clerk together with the \$170 index fee.<sup>79</sup> As noted under CPLR 203, a court order may establish the commencement date if circumstances prevent filing.<sup>80</sup>

*(d) CPLR 305*

The summons must indicate the index number assigned and the date of filing. The third-party summons must also indicate the date of filing. If the summons is served without the index number and date of filing, it may be dismissed on jurisdictional grounds.<sup>81</sup>

*(e) CPLR 306-a; CPLR 1007 (third party actions)*

Third party actions require filing the summons and complaint or summons with notice and paying the \$170 fee under CPLR 8018.<sup>82</sup> A

---

74. *See id.* 203(b)(5) (McKinney 1990 & Supp. 1992).

75. *Id.*

76. *See* sources cited *supra* note 55.

77. *See* N.Y. CPLR 306-b(b) (McKinney 1990 & Supp. 1992).

78. *See id.* 306(a) (McKinney 1990 & Supp. 1992).

79. *See* sources cited *supra* note 55.

80. *See* N.Y. CPLR 203(c)(2) (McKinney 1990 & Supp. 1992).

81. It is possible the court will consider a summons served without the index number and date of filing on it a mere "irregularity" that can be cured, but why take the chance?

82. *See* N.Y. CPLR 1007 (McKinney 1976 & Supp. 1992).

third party action requires payment of an additional fee but no new index number will be assigned.<sup>83</sup>

(f) *CPLR 306-b*

Within 120 days from the date plaintiff files the summons and complaint or summons and notice, he must also file proof of service.<sup>84</sup> If the plaintiff fails to do so, the complaint is automatically dismissed without prejudice and without costs.<sup>85</sup> The defendant cannot waive the filing requirement.<sup>86</sup> If the statute of limitations is four months or less, i.e., Article 78 proceedings, proof of service must be filed not later than fifteen days after the statute of limitations expires.<sup>87</sup>

If the action was timely commenced but dismissed “for failure to effect proper service,” i.e., failure to file proof of service within the first 120 days, or failure to make proper service pursuant to the strict compliance requirements in New York, plaintiff may refile and receive another 120 days to complete the service. If service is not made during the first 120 days, the original action is deemed dismissed and the second 120 days starts immediately upon the date the action is automatically dismissed.<sup>88</sup> If service was attempted but “improper” for failure to comply with New York’s strict compliance requirements, the second 120 days starts from the dismissal “despite the expiration of the statute of limitations after commencement of the original action.”<sup>89</sup>

Thus, if a tort action with a three year statute of limitations accrued on April 1, 1990, and the plaintiff files a summons and complaint or summons and notice on March 30, 1993, the action is timely. However, plaintiff must properly serve defendant and file proof of service within 120 days from March 30, 1993. Assume plaintiff purports to serve defendant on May 1, 1993, and files proof of service on that date. Defendant answers on June 1, 1993, and raises the affirmative defense of improper service. Plaintiff does not move to strike the defense and the court decides service was improper (no jurisdiction) on

---

83. *Id.*

84. *See* N.Y. CPLR 306-b (McKinney 1990 & Supp. 1992).

85. *Id.*

86. *See* sources cited *supra* note 55.

87. *See* N.Y. CPLR 306-b(b) (McKinney 1990 & Supp. 1992).

88. *See id.* 306-b (McKinney 1990 & Supp. 1992).

89. *Id.*

June 1, 1996! Plaintiff has 120 days from that date to commence a new action, properly serve the defendant and file proof of service.

### 3. *Procedural Steps*

- First: Prepare the summons with notice or summons and complaint as you would ordinarily, except the summons should provide for entering the index number and the date of filing.
- Second: Go to the Clerk's office with copies of the papers prepared in step one.
- Third: File the papers. When filing with the \$170 fee for the index number be sure to ask the clerk for a receipt and a copy of the papers date-stamped. If the clerk advises that he will stamp and file the papers at a later date, inform him politely that it is extremely important for you to have the papers date-stamped immediately. Failure to do so could result in a clerical filing error that might cause your papers to be filed after the statute of limitations has run. This could result in a dismissal on statute of limitations grounds. Also, if there are two or more clerks of the court, be sure to file with the proper clerk. If you are not sure, file with both clerks.<sup>90</sup>
- Fourth: Enter the index number and date of filing on the summons to be served upon the defendant(s).

---

90. See David D. Siegel, *The Filing System That Takes Over On January 1, 1993, Part III*, N.Y. ST. L. DIG., No. 395 (1992). Professor Siegel discusses who is "the clerk of the court." He reminds us that by statute it is the county clerk who is the clerk of both the supreme court and the county court in her county. See N.Y. COUNTY LAW §§ 525, 909 (McKinney 1991 and Supp. 1993). However, in some places the supreme court and county court have separate nonjudicial officers who do the filing for those courts. Their offices may even be separated geographically. Professor Siegel suggests: "To be sure of satisfying both the practicalities and the technical law, we've heard some lawyers say that they file initiatory papers with both, when there are separate offices." Siegel, *supra*.

- Fifth: Serve the defendant(s) within 120 days of the filing in step three. REMEMBER that New York decisional law requires STRICT COMPLIANCE for service of summons and complaint or summons and notice. Failure to strictly comply with the service statutes may result in a jurisdictional dismissal. The dismissal is not fatal because plaintiff will have another 120 days from the date of dismissal to commence a new action and make proper service, but who wants to do that?
- Sixth: File proof of service within 120 days of the filing.

#### 4. *New York Rule Differs From Federal Practice*

Lawyers should note the following important differences between federal filing requirements and the New York filing requirements. First, in federal court actions the defendant must be served within 120 days from the date the summons and complaint is filed, but proof of service can be made thereafter. CPLR 306-a requires both filing, service, and proof of service within the 120 day period. Also, in federal practice the clerk of the court issues the summons. Second, under federal law the 120 day service requirement is not applicable if service is made on a defendant in a foreign country. New York's new filing law does not provide for this exception. Third, Rule 6 of the Federal Rules of Civil Procedure provides for a motion to enlarge the 120 day period.<sup>91</sup> The New York law contains no such provision.

How will the New York filing law affect federal diversity actions? In these actions timely service for limitations purposes must be measured by state, rather than federal law on the authority of *Walker v. Armco Steel Corp.*<sup>92</sup> Can the practitioner rely on the 120 days of CPLR 306-b, or the 120 days of Rule 4(j) of the Federal Rules of Civil Procedure? Professor Siegel suggests "[a] better answer than the right answer is to take steps that would satisfy both of them."<sup>93</sup>

#### 5. *Impact on Provisional Remedies*

The new laws do not affect provisional remedies but the practitioner should remember that in attachment practice, service must be

---

91. See FED. R. CIV. P. 6.

92. 446 U.S. 740 (1980).

93. See David D. Siegel, *Filing System, Part IV*, N.Y. ST. L. DIG., No. 396 (1992). Kudos to Professor Siegel for his four digest articles discussing the new filing laws.

made within the sixty day period required by CPLR 6213. Also, in *lis pendens* cases, under CPLR 6512 the technical effectiveness of the notice provided by a notice of pendency depends on service within 30 days after filing.

#### 6. *Default Judgements*

Assuming proof of service is filed within the 120 period following filing, the new scheme does not appear to impact on default judgments, except that a defaulting defendant, who has a valid claim that jurisdiction was not obtained, may get out from under the default under CPLR 5015(a)(4). In this situation, the plaintiff would be free to take advantage of CPLR 306-b, possibly at a dramatically long delay from the commencement of the original action.

#### 7. *RJI Forms*

Requests for Judicial Intervention ("RJI") are not affected by the new legislation. Remember that under the new IAS rules, effective January 1, 1993, preliminary conferences will occur within forty-five days of the filing of an RJI, unless the parties complete and submit an agreed-upon disclosure schedule on a form order before the conference.<sup>94</sup>

#### 8. *Matrimonial Actions*

Matrimonial actions are commenced by filing, and not service. Although the new laws contain minor amendments to Domestic Relations Law 211,<sup>95</sup> it should be noted that statute of limitations problems seldom occur in matrimonial matters.

#### 9. *New Rules Not Applicable in Inferior Courts*

The Uniform District Court Act, the New York City Civil Court Act, the Uniform City Court Act, and the Uniform Justice Court Act specifically state the new filing laws do not apply in district, city, civil, and justice courts.<sup>96</sup> Also, the new laws do not apply in the Court of Claims.<sup>97</sup> Thus, the practitioner must remember that in these courts the statute of limitations will be stopped only by properly making ser-

---

94. See *supra* note 15 and accompanying text.

95. See N.Y. DOM. REL. LAW § 211 (McKinney 1988 & Supp. 1992).

96. See *supra* notes 46-49 and accompanying text.

97. See N.Y. CT. CL. ACT § 10 (McKinney 1989 & Supp. 1992).

vice of summons and complaint or summons and notice on the defendant. If the plaintiff fails to do so and the statute of limitations has expired, the action is dismissed and plaintiff will not be allowed to recommence it.<sup>98</sup>

#### *10. Problem Areas (What if Things Go Wrong?)*

##### *(a) Single Defendant Lawsuits*

CPLR 306-b(a) and (b) must be read together because, even if the plaintiff fails to comply with the 120 day requirement of subsection (a), he still has a second bite at the apple. The following examples illustrate how the new scheme works.

##### *EXAMPLE I*

The summons and complaint are filed on April 1, 1993, the day the statute of limitations expires. The 120 day period within which to serve defendant and file proof of service runs out on August 1, 1993. If proof of service is not filed, or if defendant does not appear, or if defendant is not served by August 1, 1993, (and proof of service made on that date) the action is "deemed dismissed." But, according to CPLR 306-b(b), plaintiff has 120 days from August 1, 1993 (or until December 1, 1993), to file a "new" summons and complaint or summons and notice, purchase a "new" index number, properly serve the defendant, and file proof of service in the "new" action against the defendant.

##### *EXAMPLE II*

As in Example I, filing occurs on April 1, 1993. The process server subsequently returns with an affidavit of service, which indicates that service was made on June 1, 1993. Proof of service is filed within a few days after plaintiff's lawyer receives the affidavit. Defendant makes a timely motion before Justice S to dismiss, correctly showing (as it turns out) that service was botched. Justice S's calendar rules are such that the motion is not heard until August 1, 1993 and not decided until December 1, 1993, when by decision order Justice S dismisses the action. CPLR 306-b(b) allows plaintiff 120 days from December 1, 1993 (or until April 1, 1994), to file a summons and

---

98. See Carlisle, *Civil Practice, 1991 Survey*, *supra* note 34, at 123.

complaint or summons and notice, serve the defendant and file proof of service in a "new" action against the defendant.

### *EXAMPLE III*

As in Example I, filing occurs on April 1, 1993. The process server makes service by leave and mail, or nail and mail under CPLR 308 and returns with an affidavit of service which indicates that the leave or nail was completed on July 15, 1993, and the mailing was completed on July 25, 1993. CPLR 308(2) and (4) require that proof of service be filed with the clerk of the court designated in the summons within twenty days of the mailing. Does the plaintiff have until August 5, 1993, to file proof of service or does the 120 day period in CPLR 306-b(a) govern and require plaintiff to file proof of service by August 1, 1993? If plaintiff fails to make proof of service by August 1, 1993, the action will automatically be deemed dismissed. Plaintiff will then have to file a "new" action, purchase a new index number, and start over again.

### *(b) Multi-Defendant Lawsuits*

In multi-defendant lawsuits, filing with the clerk of the court will satisfy the statute of limitations as to all defendants, but proof of service must be filed within 120 days as to each defendant who has not appeared. The action is "deemed dismissed" as to any defendant who has not been served, and as to whom proof of service has not been filed, by the end of the 120 day period. The examples above also serve to illustrate the consequences of dismissal as to one of several co-defendants. Note that when a "new" action is commenced as to the co-defendant, separate actions (the original action plus the "new" action) exist. As a consequence, assuming the "new" action satisfies the CPLR scheme, plaintiff should make a motion to consolidate the original and "new" actions.

Finally, mention should be made of the obvious fact that judicial interpretation will be crucial to the application of the new filing laws and until decisions are rendered the practitioner should proceed with caution.<sup>99</sup> Also, it would appear that defendants draw no terminal

---

99. See *Farmer v. King*, No. 17618 (Sup. Ct. Westchester Co. Oct. 14, 1992). In *Farmer*, petitioner timely began a proceeding by filing an order to show cause and petition to challenge the result of a primary election. The petition was dismissed for failure to effectuate it within the time required by the order to show cause. Within fifteen days

advantage from successfully challenging the adequacy of service in supreme and county court civil actions because of the grace period provided by CPLR 306-b(b). However, "hardball" defendants can be expected to file CPLR 3211(a)(8) defenses. Similarly, there seems to be no reason for the plaintiff to appeal a trial judge's grant of a motion to dismiss for lack of proper service because commencement of a "new" action would solve the problem considerably faster and cheaper than an appeal. We thank Professor Farrell for his thoughtful input on the new filing law.

## II. STATUTE OF LIMITATIONS

During the *Survey* year, the Court of Appeals issued at least three important statute of limitations opinions<sup>100</sup> and one opinion regarding the timely filing of a notice of claim.<sup>101</sup> Also, several appellate divisions issued opinions worthy of mention.<sup>102</sup>

### A. Court of Appeals

#### 1. CPLR 203(b) Interposition of Claim and the "United In Interest" Doctrine

In *Mondello v. The New York Blood Center*,<sup>103</sup> the Court of Appeals examined and clarified the "united in interest" doctrine provided for in CPLR 203(b).<sup>104</sup> This is a relation back rule which provides, in pertinent part, that a "claim asserted in the complaint is interposed against the defendant or co-defendant united in interest . . . when . . . the summons is served upon the defendant . . . ."<sup>105</sup> The appellate division, in *Brock v. Bua*,<sup>106</sup> gave the rule a three-prong specificity, patterned largely after the federal "relation back" test

---

from the dismissal, petitioner began a new proceeding by filing a second order to show cause with the clerk. Respondents moved to dismiss the petition as time barred and the petitioner opposed the motion based upon the fifteen day extension required by CPLR 306-b(a). Justice Ingrassia granted a motion to dismiss. He reasoned that election cases have a statute of limitations of only ten days and that the extension sought by the petitioner was one and one-half times greater than the statute of limitations and that to hold otherwise would frustrate the clear intention of the election law.

100. See *infra* notes 103-157 and accompanying text.

101. See *infra* notes 158-163 and accompanying text.

102. See *infra* notes 168-180 and accompanying text.

103. 80 N.Y.2d 219, 604 N.E.2d 81, 590 N.Y.S.2d 19 (1992).

104. See N.Y. CPLR 203(b) (McKinney 1990 & Supp. 1992).

105. *Id.*

106. 83 A.D.2d 61, 443 N.Y.S.2d 407 (2d Dep't 1981).

codified in Rule 15(c) of the Federal Rules of Civil Procedure.<sup>107</sup> The *Brock* test examines whether (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well.<sup>108</sup> All three features must be met for the statutory relation-back remedy to be operative.<sup>109</sup>

The *Mondello* case originated with the deaths, apparently of complications from AIDS-related diseases, of an infant child in late 1986 and her mother in early 1987. In 1984, the mother received intravenous transfusions of apparently HIV-infected blood. Her widower instituted an action in 1987 against defendant-appellant New York Hospital ("Hospital") and several physicians on behalf of himself and his deceased spouse's and daughter's estates. After some discovery, the 1987 complaint was amended in 1989 to add the New York Blood Center ("Blood Center") as a defendant. The Court of Appeals noted that the controversy was "still at its early but critical motion stages"<sup>110</sup> and framed the issue as to "whether the wrongful death causes of action against the Blood Center were started too late and are thus time barred."<sup>111</sup> The Court stated, "[u]nless the defendant Hospital and putative defendant Blood Center are 'united in interest' within the meaning of CPLR 203(b) and *Brock v. Bua*,<sup>112</sup> the wrongful death causes of action against the party added in 1989, defendant Blood Center, are concededly untimely and cannot be related back to the timely commenced action against defendant Hospital."<sup>113</sup> The supreme court had dismissed those causes of action against the Blood Center which sounded in strict product liability and breach of warranty but declined on prematurity grounds to dismiss causes

---

107. See FED. R. CIV. P. 15(c)

108. *Brock*, 83 A.D.2d at 69, 443 N.Y.S.2d at 412.

109. See *id.*

110. See *Mondello*, 80 N.Y.2d at 223, 604 N.E.2d at 83, 590 N.Y.S.2d at 21.

111. *Id.*

112. 83 A.D.2d at 61, 443 N.Y.S.2d at 407.

113. *Mondello*, 80 N.Y.2d at 223, 604 N.E.2d at 83, 590 N.Y.S.2d at 21.

against the Blood Center sounding in negligence for loss of services and for conscious pain and suffering. These were deemed governed by the "toxic substance" discovery rule of CPLR 214-c and, thus, additional disclosure would be necessary to ascertain the dispositive discovery date.<sup>114</sup>

The Court of Appeals noted that the only part of the supreme court's ruling before it was the dismissal of the wrongful death causes of action against the Blood Center on statute of limitations grounds.<sup>115</sup> The supreme court had explained that the two year bar of Estates, Powers and Trusts Law ("EPTL") section 5-4.1 would apply to those actions, unless plaintiff could demonstrate that the Blood Center and the Hospital were united in interest within the meaning of CPLR 203(b). The supreme court "concluded, however, that the Hospital and Blood Center were 'at most joint tortfeasors and not parties united in interest.'"<sup>116</sup> The Appellate Division for the First Department reversed the dismissal of the wrongful death causes of action.<sup>117</sup> "It adopted and applied the relation back test formulated by the Appellate Division, Second Department, in *Brock v. Bua*."<sup>118</sup> The Court of Appeals, by Judge Bellacosa, identified the second prong of the *Brock* unity of interest test as "the central dispositive focus of this appeal."<sup>119</sup> Judge Bellacosa reasoned that the appellate division had erred when it failed to address the question of whether "the facts of this case might present an exception to the general rule that parties are not liable for the negligence of independent contractors either because plaintiff reasonably looked only to the Hospital for the performance of the service . . . or because the harm caused arose from a danger inherent in the work."<sup>120</sup> Judge Bellacosa stated, "[w]e find it necessary to address and resolve the latter questions because plaintiff now concedes that the regulation relied on by the parties and appellate division up to this point in the litigation was not in effect at the relevant time at issue. It simply is not dispositive in this case."<sup>121</sup> After a lengthy analysis with respect to vicarious liability, the Court reversed the appellate division and held that the interest of the Hospi-

---

114. *Id.* at 224-25, 604 N.E.2d at 84, 590 N.Y.S.2d at 22.

115. *Id.* at 225, 604 N.E.2d at 84, 590 N.Y.S.2d at 22.

116. *Id.*

117. *Id.*

118. *Mondello*, 80 N.Y.2d at 225, 604 N.E.2d at 84, 590 N.Y.S.2d at 22.

119. *Id.*

120. *Id.*

121. *Id.* at 225-26, 604 N.E.2d at 84, 590 N.Y.S.2d at 22.

tal and the Blood Center in the subject matter was not such that they stood or fell together so that a judgment against one would similarly affect the other.<sup>122</sup>

2. *CPLR 205(a): Six Month Extension Not Available in Court of Claims Action*

In *Dreger v. New York State Thruway Authority*,<sup>123</sup> the Court of Appeals again had an opportunity to address the question of what constitutes timely commencement for purposes of allowing a recommencement of an action under CPLR 205(a).<sup>124</sup> In the principal case and two companion cases,<sup>125</sup> counsel for plaintiffs had not strictly followed the Court of Claims Act procedure for filing a notice of claim. The Court of Appeals, in a memorandum opinion, began by stating, "[i]n each of these actions a claim against the State or the Thruway Authority was dismissed for failure to serve a copy of the claim on the Attorney General in the manner prescribed by the Court of Claims Act [section] 11."<sup>126</sup> The Court noted that "in *Dreger*, the claimant served the Thruway Authority but neglected to serve the Attorney General. In the [companion cases], copies of the claims were mailed to the Attorney General but were not sent by certified mail as the statute requires. Because of these failures, the actions were subsequently dismissed and time-barred."<sup>127</sup> The Court noted that "[t]he Court of Claims Act contains no recommencement provision of its own, but [that] section 10(6) expressly incorporates the time limitations and tolling provisions of article 2 of the CPLR . . . ."<sup>128</sup> The Court then stated, "[t]hus, these actions may be recommenced if they qualify for recommencement under CPLR 205(a)"<sup>129</sup> and framed the question on appeal as "whether these claimants failed to meet the statutory timely commencement requirement because of their failure to serve the Attorney General properly."<sup>130</sup> The Court explained that

---

122. *Id.* at 226, 604 N.E.2d at 85, 590 N.Y.S.2d at 23.

123. 81 N.Y.2d 721, 609 N.E.2d 111, 593 N.Y.S.2d 758 (1992).

124. N.Y. CPLR 205 (McKinney 1990 & Supp. 1992).

125. *See Charbonneau v. State & Dalton v. State*, 81 N.Y.2d 721, 609 N.E.2d 111, 593 N.Y.S.2d 758 (1992).

126. *Dreger*, 81 N.Y.2d at 722, 609 N.E.2d at 111, 593 N.Y.S.2d at 758; *see* N.Y. CT. CL. ACT § 11 (McKinney 1989).

127. *Dreger*, 81 N.Y.2d at 722-23, 609 N.E.2d at 111, 593 N.Y.S.2d at 758.

128. *Id.* at 723, 609 N.E.2d at 112, 593 N.Y.S.2d at 759.

129. *Id.*

130. *Id.*

"Court of Claims Act, section 11 establishes a notice requirement in addition to that which may be applicable under other statutes."<sup>131</sup> It mandates serving a copy of the claim or notice of intention on the Attorney General, either personally or by certified mail.<sup>132</sup> The Court of Appeals further explained that "both filing with the court and service on the Attorney General must occur within the applicable limitations period, and there is no basis for believing that the Legislature intended filing to independently constitute commencement."<sup>133</sup>

The Court of Appeals concluded that "[b]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed."<sup>134</sup> The Court stated, "[a]ccordingly, where, as here, claimants have not met the literal requirements of Court of Claims Act § 11, their actions are not timely commenced, and relief under CPLR 205(a) is not available."<sup>135</sup> Then-Judge Kaye filed a strong dissent.<sup>136</sup> She stressed that the Court of Appeals has long recognized that a CPLR 205(a) request to recommence a dismissed action must be liberally viewed.<sup>137</sup> Judge Kaye, relying on the words of former Chief Judge Cardozo, argued that the "broad and liberal purpose" of CPLR 205(a) should not be "frittered away by any narrow construction."<sup>138</sup> She explained that the Court of Claims Act, in contrast to the CPLR, does not specify when an action is "commenced."<sup>139</sup> Thus, Judge Kaye concluded,

In the CPLR, the Legislature chose to prescribe when an action is commenced, and those requirements must be literally satisfied before relief can be allowed under CPLR 205(a). The Legislature may well choose a parallel course for the Court of Claims Act. Unless and until it does so, however, this Court should not itself impose requirements that deny plaintiffs the intended benefit of CPLR 205(a).<sup>140</sup>

---

131. *Id.* at 724, 609 N.E.2d at 112, 593 N.Y.S.2d at 759.

132. *Dreger*, 81 N.Y.2d at 724, 609 N.E.2d at 112, 593 N.Y.S.2d at 759.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 724-25, 609 N.E.2d at 112-13, 593 N.Y.S.2d at 759-60.

137. *Dreger*, 81 N.Y.2d at 724-25, 609 N.E.2d at 113, 593 N.Y.S.2d at 760 (Kaye, J., dissenting).

138. *Id.* at 724, 609 N.E.2d at 112-13, 593 N.Y.S.2d at 759-60.

139. *Id.* at 725, 609 N.E.2d at 113, 593 N.Y.S.2d at 760.

140. *Id.*

### 3. *CPLR 208: Infancy Toll Not Applicable in Wrongful Death Action*

In *Baez v. New York City Health and Hospitals Corp.*,<sup>141</sup> the primary issue presented was whether CPLR 208 applied to toll the statute of limitations for commencing a cause of action for "wrongful death and conscious pain and suffering on behalf of infant beneficiaries where the decedent's will named plaintiff executrix of her estate and stated that plaintiff should be appointed guardian for her infant children."<sup>142</sup>

On April 17, 1986, Rosa Caraballo died while receiving treatment at a hospital owned and operated by the defendant.<sup>143</sup> Prior to her death she had executed a will naming her mother, Carmen Baez, executrix of her estate and guardian of her infant children.<sup>144</sup> "On October 7, 1986, testamentary letters were issued to Baez authorizing her to administer her daughter's estate."<sup>145</sup> "Letters of guardianship for the decedent's two children were issued to Carmen Baez on November 18, 1986."<sup>146</sup> "On January 5, 1987 Carmen Baez, on behalf of the infants, filed a notice of claim for wrongful death and conscious pain and suffering against the defendant."<sup>147</sup> On July 24, 1987, more than one year and ninety days after her daughter's death, Baez served a summons and complaint upon the defendant and started a second wrongful death case against two doctors who allegedly operated on the decedent.<sup>148</sup> The supreme court denied a motion to dismiss on the grounds that the applicable statute of limitations was tolled until the date of the guardian's appointment.<sup>149</sup> The appellate division reversed the judgment and held that the limitations period began to run on the date of decedent's death rather than on the date of the appointment of decedent's mother as executrix or guardian and, as there was an adult relative of the deceased who could have instituted the action on behalf of the decedent, a toll for infancy was unavailable.<sup>150</sup> The

---

141. 80 N.Y.2d 571, 607 N.E.2d 787, 592 N.Y.S.2d 640 (1992).

142. *Id.* at 574, 607 N.E.2d at 787, 592 N.Y.S.2d at 640.

143. *Id.* at 574-75, 607 N.E.2d at 788, 592 N.Y.S.2d at 641.

144. *Id.* at 575, 607 N.E.2d at 788, 592 N.Y.S.2d at 641.

145. *Id.*

146. *Baez*, 80 N.Y.2d at 575, 607 N.E.2d at 788, 592 N.Y.S.2d at 641.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Baez v. N.Y. City Health & Hosps. Corp.*, 168 A.D.2d 529, 563 N.Y.S.2d 89 (2d Dep't 1990).

appellate division granted plaintiffs' motion for leave to appeal to the Court of Appeals.<sup>151</sup>

The Court of Appeals pointed out that under the Estates Powers and Trust Law section 5-4.1,<sup>152</sup> personal representatives of a decedent have two years, measured from the date of death, in which to commence a wrongful death cause of action.<sup>153</sup> The Court also noted that at the time the present litigation was commenced, a one-year and ninety day statute of limitations applied to actions brought against the defendant and its employees.<sup>154</sup> The Court distinguished *Ratka v. St. Francis Hospital*,<sup>155</sup> and *Hernandez v. New York City Health and Hospitals Corp.*,<sup>156</sup> and stated:

In this case, the decedent's will named plaintiff Baez executrix of her estate. Upon her daughter's death, plaintiff Baez could have timely sought appointment as a personal representative to commence the actions on behalf of the infant children and her failure to do so does not suspend the running of the applicable limitations period. The actions against defendants are untimely because they were not commenced until after the one year and 90-day statutory period had expired.<sup>157</sup>

#### 4. *Notice of Claim Dismissed for Failure to Comply With General Municipal Law*

In *Pedrero v. Moreau*,<sup>158</sup> the Court of Appeals, in a memorandum opinion, reversed the order of the appellate division and held that plaintiff had failed to follow the notice of claim procedure set forth in General Municipal Law 50-d(1).<sup>159</sup> The Court explained that plaintiff, born June 3, 1970, commenced this malpractice action against six physicians for injuries allegedly sustained as a result of a negligently-induced premature birth.<sup>160</sup> "In 1982, a notice of claim was served upon the Comptroller of the City of New York, and in 1983, the supreme court permitted plaintiff to serve late notice of

---

151. *Id.* at 529, 563 N.Y.S.2d at 89.

152. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1981 & Supp. 1992).

153. *Baez*, 80 N.Y.2d at 576, 607 N.E.2d at 788, 592 N.Y.S.2d at 641.

154. *Id.*

155. 44 N.Y.2d 604, 378 N.E.2d 1027, 407 N.Y.S.2d 458 (1978).

156. 78 N.Y.2d 687, 585 N.E.2d 822, 578 N.Y.S.2d 510 (1991).

157. *Baez*, 80 N.Y.2d at 576, 607 N.E.2d at 788-89, 592 N.Y.S.2d at 641-42.

158. 81 N.Y.2d 731, 609 N.E.2d 117, 593 N.Y.S.2d 764 (1992).

159. N.Y. GEN. MUN. LAW § 50-d(1) (McKinney 1986 & Supp. 1992).

160. *Pedrero*, 81 N.Y.2d at 732, 609 N.E.2d at 117, 593 N.Y.S.2d at 764.

claim.”<sup>161</sup> The Court of Appeals held that the notice served on the city was untimely since it was served more than ten years after plaintiff’s birth.<sup>162</sup> The Court concluded, “[t]hus if such notice was a prerequisite to this action, [the] Supreme Court properly dismissed the complaint.”<sup>163</sup>

### *B. Other Opinions*

#### *1. Continuous Treatment Doctrine*

Under the doctrine of continuous treatment, the statute of limitations is tolled until after the course of treatment. Continuous treatment includes the wrongful acts or omissions that have run continuously and are related to the same original condition of complaint.<sup>164</sup> The applicability of the continuous treatment doctrine requires that there be more than merely a continuing relationship between the physician and the patient.<sup>165</sup> The underlying rationale is the existence of a continuing trust and confidence which warrants the tolling of the limitations period.<sup>166</sup> Thus, continuous treatment contemplates scheduled appointments for future visits and, absent a clear agency relationship, the doctrine cannot be imputed from one doctor to another.<sup>167</sup> During the *Survey* year, two appellate divisions reached different decisions on the question of what constitutes a legally relevant relationship sufficient for imputation purposes.<sup>168</sup>

In *Raymonde Pierre-Louis v. Ching-Yuan Hwa*,<sup>169</sup> the Appellate Division for the Second Department was faced with the question of whether continuous treatment provided by others at the defendants’ hospital was sufficient to toll the statute of limitations. The appellate division stressed that “a continued relationship must be shown between the treating doctor and the misdiagnosing defendant in order to

---

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* *McDermott v. Torre*, 56 N.Y.2d 399, 405, 437 N.E.2d 1108, 1110, 452 N.Y.S.2d 351, 353 (1982) (quoting *Borgia v. City of N.Y.*, 12 N.Y.2d 151, 189 N.E.2d 777, 237 N.Y.S.2d 319 (1962)).

165. *McDermott*, 56 N.Y.2d at 405, 437 N.E.2d at 1110, 452 N.Y.S.2d at 353.

166. *See id.*

167. *See id.*

168. *See* *Siegel v. Wank*, 183 A.D.2d 158, 589 N.Y.S.2d 934 (3d Dep’t 1992); *Raymonde Pierre-Louis v. Ching-Yuan Hwa*, 182 A.D.2d 55, 587 N.Y.S.2d 17 (2d Dep’t 1992).

169. *Raymonde Pierre-Louis*, 182 A.D.2d at 55, 587 N.Y.S.2d at 17.

prolong the statute of limitations against the latter.”<sup>170</sup> The appellate division concluded that the plaintiff had “failed to demonstrate the existence of a legally-relevant relationship between the defendants and the subsequently treating Downstate doctors.”<sup>171</sup> The court stated, “[t]hat the defendants and their successors were ‘co-employees’ of Downstate is insufficient for the imputation of the latter’s continuous treatment to the former for the purpose of tolling the statute of limitations.”<sup>172</sup>

In *Siegel v Wank*,<sup>173</sup> the Appellate Division for the Third Department affirmed the supreme court’s denial of a CPLR 3211(a)(5) motion to dismiss. On July 12, 1988, defendant Watson and defendant Wank performed dental implant surgery on the plaintiff.<sup>174</sup> Plaintiff experienced various complications and underwent additional procedures with Dr. Watson.<sup>175</sup> She then commenced an action for dental malpractice against the defendants and served Dr. Wank with a summons and notice on February 15, 1991.<sup>176</sup> He moved to dismiss on the grounds of statute of limitations.<sup>177</sup> Plaintiff alleged that when she first experienced problems following the initial surgery, Dr. Watson told her that he had consulted with Dr. Wank who, in turn, “advised [Watson] to perform a surgical procedure to clean out the area around the implants.”<sup>178</sup> Plaintiff also alleged that Dr. Watson consulted with Dr. Wank on a regular basis throughout the course of her treatment and that this constituted a legally relevant relationship sufficient for imputation purposes.<sup>179</sup> The appellate division held that plaintiff had averred evidentiary facts, albeit hearsay, to raise a question of fact as to the applicability of the continuous treatment doctrine.<sup>180</sup>

---

170. *Id.* at 59, 587 N.Y.S.2d at 19.

171. *Id.* at 59, 587 N.Y.S.2d at 20.

172. *Id.*

173. *Siegel*, 183 A.D.2d at 158, 589 N.Y.S.2d at 934.

174. *Id.* at 159, 589 N.Y.S.2d at 935.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Siegel*, 183 A.D.2d at 160, 589 N.Y.S.2d at 936.

179. *Id.* at 161, 589 N.Y.S.2d at 936.

180. *Id.*

2. *CPLR 214-c: Microwave Radiation Is "Substance" and 214-c(4) Is Expansively Applied*

In *Ford v. American Telephone Co.*,<sup>181</sup> "a former navy member who allegedly contracted lymphoma as a result of exposure to microwave radiation while he was stationed aboard a navy vessel [from 1965-1967] brought a personal injury action against the entities responsible for the design, construction, manufacture, or installation of the on-board radar equipment."<sup>182</sup>

On motions for summary judgment, the Supreme Court held . . . that: (1) microwave radiation was a 'substance' within the meaning of the statute extending the three-year statute of limitations for injury caused by the latent effects of exposure to a substance, and (2) the one year limitation on bringing an action after discovering cause of the injury applies only when the cause of the injury is discovered more than two years after the discovery of the existence of the injury and, thus, operates only to extend the three-year statute of limitations.<sup>183</sup>

3. *Federal Law Governs Some Questions of When a Federal Claim Accrues*

In *Morse v. University of Vermont*,<sup>184</sup> the United States Court of Appeals for the Second Circuit reminded the bench and bar that federal law governs the question of when a federal claim accrues notwithstanding that a state statute of limitations is to be used.<sup>185</sup> The court held that the plaintiff's action under a section of the Rehabilitation Act of 1973, 29 U.S.C. section 794 (1988), was governed by the state statute of limitations applicable to a personal injury action. In this respect, the practitioner should be alerted to 28 U.S.C. section 1658<sup>186</sup> which enacts a general four year statute of limitations respecting civil actions arising under Acts of Congress that do not specifically set forth a period of limitations. This provision applies only to causes of action arising under legislation that Congress enacts after December 1, 1990.<sup>187</sup> Thus, the new statute is not retroactive. Also, the new

---

181. 154 Misc. 2d 894, 586 N.Y.S.2d 721 (Sup. Ct. N.Y. Co. 1992).

182. *Id.* at 894, 586 N.Y.S.2d at 721.

183. *Id.*

184. 973 F.2d 122 (2d Cir. 1992).

185. *Id.* at 125.

186. *See* 28 U.S.C. § 1658 (1992).

187. *Id.*

statute does not consider whether there should be tolling provisions applicable to federal statutes of limitations and does not incorporate applicable state tolling provisions by reference. The practitioner is reminded that the new statute is not applicable in diversity cases where state limitation periods and tolling provisions are applied.<sup>188</sup>

### III. JURISDICTION

#### A. *Subject Matter Jurisdiction*

The most important subject matter jurisdiction decision rendered during the *Survey* year is the United States Supreme Court's opinion in *American National Red Cross v. S.G.*<sup>189</sup> A blood recipient brought a state court action against the American National Red Cross to recover for AIDS allegedly caused by contaminated blood. Red Cross removed the suit to federal court. The United States Supreme Court, in a closely divided opinion, held that the Red Cross charter created original federal jurisdiction over suits involving the Red Cross.<sup>190</sup> This decision has important implications for the New York practitioner because whenever a statute granting a federally chartered corporation the "power to sue and be sued" specifically mentions the federal courts, the law will be deemed to confer on federal district courts jurisdiction over any and all controversies to which that corporation is a party. Since there are hundreds of federally chartered corporations, the plaintiff's lawyer who files his tort case in the Bronx Supreme Court may have the case removed to the United States District Court for the Southern District of New York in Manhattan or White Plains.

#### B. *In Personam Jurisdiction*

There are several *Survey* year cases worthy of mention. One federal district court has established special jurisdictional rules to handle mass tort litigation<sup>191</sup> and several appellate divisions have issued important opinions regarding long-arm jurisdiction and the Uniform Child Custody Jurisdiction Act.<sup>192</sup> In addition, there are many strict

---

188. For a fuller discussion of the new federal statute of limitations see David D. Siegel, *The Statute of Limitations in Federal Practice, Including the New "General" One in Federal Questions Cases*, 134 F.R.D. 481 (1991).

189. 112 S. Ct. 2465 (1992).

190. *Id.* at 2465.

191. *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992).

192. *See infra* notes 207-11 and notes 224-26 and accompanying text.

compliance and summons cases<sup>193</sup> and several instructive opinions regarding the waiver of jurisdictional defenses.<sup>194</sup> Also, we note the first decision discussing the Inter-American Convention on Letters Rogatory.<sup>195</sup>

### 1. *Broad Jurisdiction Ruling in DES Cases*

In *In re DES Cases*,<sup>196</sup> Judge Weinstein announced a new approach to determining whether in personam jurisdiction exists over defendants in mass tort litigation. His approach rejects the time-worn territorial nexus approach.<sup>197</sup> Judge Weinstein reasoned that once a plaintiff demonstrates that the state where a lawsuit is filed has an "adequate" interest to support jurisdiction, even if it is non-territorial, a prima facie case for jurisdiction can be made.<sup>198</sup> Judge Weinstein also held that a defendant could avoid in personam jurisdiction if it could demonstrate the lawsuit would cause it "relatively substantial hardship."<sup>199</sup>

### 2. *Long-Arm Jurisdiction Under CPLR 302(a)(1)*

In *Bank of New York v. Strumor*,<sup>200</sup> the appellate division held that a New Mexico maker of a note was subject to in personam jurisdiction in New York in an action to recover on the note. The defendant had signed the note in New Mexico and the proceeds of the note were payable in New York and to be used to finance the purchase of a New York limited partnership. The note was also secured by an agreement pledging the maker's shares in the limited partnership, and the pledge agreement provided that any question would be governed by New York law.<sup>201</sup> The appellate division held that the totality of the defendant's acts, whereby he availed himself of the benefits and protection of New York law, demonstrated sufficient purposeful activity in New York to constitute a transaction of business under CPLR 302(a)(1). In *Glass Contractors v. Target Supply and Display, Inc.*,<sup>202</sup>

---

193. See *infra* notes 212-23 and accompanying text.

194. See *infra* notes 227-33 and accompanying text.

195. See *infra* notes 234-37 and accompanying text.

196. *DES cases*, 789 F. Supp. at 552.

197. *Id.* at 585.

198. *Id.* at 587.

199. *Id.*

200. 179 A.D.2d 736, 579 N.Y.S.2d 124 (2d Dep't 1992).

201. *Id.* at 736, 579 N.Y.S.2d at 124.

202. 152 Misc. 2d 782, 587 N.Y.S.2d 471 (Sup. Ct. App. Term, 2d & 11th Jud. Dist.

the appellate term reminded the bench and bar that, when reviewing default judgments, New York courts must limit their inquiry to ascertaining whether courts of foreign jurisdictions possess personal jurisdiction over the defendants pursuant to their long-arm statutes and not CPLR 302.<sup>203</sup> In this sense, New York has a restricted long-arm statute that does not go as far as long-arm statutes of many other states.<sup>204</sup>

Finally, in *Mareno v. Jet Aviation of America, Inc.*,<sup>205</sup> the Court of Appeals for the Second Circuit reminded the bench and bar that Federal Rule of Civil Procedure 11 sanctions may be imposed on lawyers who fail to do their long-arm jurisdictional research.<sup>206</sup>

### 3. Long-Arm Jurisdiction Under CPLR 302(b)

CPLR 302(b)<sup>207</sup> permits the exercise of in personam jurisdiction in a matrimonial action or family court proceeding involving a claim for support, alimony, maintenance, a distributive award or other special relief. The party seeking such relief must be a New York resident or domiciliary and must further provide (1) New York was the marital domicile of the parties before separation; or (2) the defendant abandoned the plaintiff in New York; or (3) the obligation to provide the relief accrued under the laws of New York; or (4) the obligation to provide such relief arose out of an agreement executed in New York. Interpretation of this statute has been characterized by a cautious attention to the due process limits lurking in the background.

During the *Survey* year the Appellate Division, Third Department upheld long-arm jurisdiction and gave an expansive interpretation to the issue of what constitutes the matrimonial domicile of the parties before their separation.<sup>208</sup> Other appellate divisions have read

---

1992). See also *China Express, Inc. v. Volpi & Son Machine Corp.*, 126 A.D.2d 239, 513 N.Y.S.2d 388 (1st Dep't 1987) (Where a sister state's exercise of long-arm jurisdiction is challenged in an action on a foreign judgment, the law of that state determines whether jurisdiction was properly asserted. This is true even if that state's long-arm statute is at odds with our rule.).

203. *Glass Contractors*, 152 Misc. 2d at 783, 587 N.Y.S.2d at 471.

204. See David D. Siegel, *The Affliction Known As Long Arm Jurisdiction*, N.Y. L.J., May 31, 1988, at 5.

205. 970 F.2d 1126 (2d Cir. 1992).

206. *Id.* at 1126. See also *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d Cir. 1989) (Federal Rule of Civil Procedure 11 sanctions applicable on plaintiff's attorney in the amount of \$10,000 for failure to do jurisdictional research).

207. See N.Y. CPLR 302(b) (McKinney 1990 & Supp. 1992).

208. See *Levy v. Levy*, 185 A.D.2d 15, 592 N.Y.S.2d 480 (3d Dep't 1993).

CPLR 302(b) more restrictively and the Court of Appeals is expected to clarify the different approaches.<sup>209</sup>

In *Levy v. Levy*,<sup>210</sup> the parties married in New York in 1970. They moved to Massachusetts in 1974 and to Texas in 1976. They reestablished their marital domicile in New York in August 1979 and moved to California in 1981. In 1982, plaintiff returned to New York with her two daughters. Defendant moved to New York in 1987 and resided there until he moved to New Jersey in 1988. In the fall of 1989, defendant moved to Washington where he still resides. He visited New York on numerous occasions and often stayed with plaintiff and his daughters where the parties presented themselves to the community as a family. The Third Department recognized that other appellate divisions had restrictively construed the meaning of "matrimonial domicile" for purposes of CPLR 302(b), but held that there were sufficient contacts by defendant with New York to comply with constitutional due process concerns relating to the application of the statute.<sup>211</sup>

#### 4. *Strict Compliance Cases*

We again remind the bench and bar that courts require strict compliance for service of summons and complaint or summons and notice.<sup>212</sup> This is important because in most courts, other than those subject to the new filing requirements,<sup>213</sup> a defect in service dismisses

---

209. See *Richardson v. Richardson*, 58 A.D.2d 861, 396 N.Y.S.2d 689 (1st Dep't 1977); *Lieb v. Lieb*, 53 A.D.2d 67, 385 N.Y.S.2d 569 (2d Dep't 1976); *Paparella v. Paparella*, 74 A.D.2d 106, 426 N.Y.S.2d 610 (4th Dep't 1980); *Klette v. Klette*, 167 A.D.2d 197, 561 N.Y.S.2d 580 (1st Dep't 1990).

210. *Levy*, 185 A.D.2d at 15, 592 N.Y.S.2d at 480.

211. *Id.*

212. See Carlisle, *Civil Practice, 1991 Survey*, *supra* note 34, at 123. Strict compliance is crucial in all courts where an action is deemed commenced by properly serving the defendant with summons and notice or summons and complaint. Thus, in the New York civil, city, district and other courts not covered by the new filing law failure to meet the strict compliance requirements can result in a jurisdictional dismissal and if the statute of limitations has expired the action will be dismissed and not receive the six month extension under CPLR 205 for recommencement of the action. In the supreme and county courts where an action is deemed commenced upon filing, the plaintiff is still required to comply with applicable service statutes in order to obtain jurisdiction over the defendant. If the plaintiff fails to comply with the statute and a defendant moves to dismiss for jurisdictional grounds, the action will be dismissed but even if the statute of limitations has run, plaintiff can file a second action. See N.Y. CPLR 306-b (McKinney 1990 & Supp. 1992).

213. N.Y. CPLR 306-b (McKinney 1990 & Supp. 1992).

the action and if the dismissal occurs after the applicable statute of limitations has expired, there is no six-month grace period under CPLR 205(a).<sup>214</sup> The lawyer must debrief the process server.<sup>215</sup>

Most strict compliance cases arise in supreme court actions. Since the new filing laws are applicable in supreme court, it is possible that fewer jurisdictional defenses will be raised by defendants because there is little to gain by a dismissal of the plaintiff's action. Also, it is unlikely that plaintiffs will appeal jurisdictional dismissals in supreme court because it will be faster and cheaper to file a new action as permitted by CPLR 306-b(b).<sup>216</sup> Nonetheless, we remind the reader that defense counsel frequently enjoy annoying counsel for plaintiffs. Failure to adhere to the requirements of the strict compliance service statutes may require the plaintiff to file a new action, pay for a new index number and then properly re-serve the defendant. Why waste the time? Finally, we alert the practitioner to the Court of Appeals for the Second Circuit's decision in *Buggs v. Ehrnschwender*,<sup>217</sup> which reminds the bar that long-arm jurisdiction in federal courts is frequently dependent upon whether the plaintiff strictly followed New York State statutory procedures for service of process.<sup>218</sup>

### 5. *Summons Practice*

In order to meet the requirement that the summons filed with the county clerk be served on a defendant within the required time period, the summons served must be exactly the same as the summons filed.<sup>219</sup> Variations in summons could be fatal. In *Scaringi v. Broome Realty Corp.*,<sup>220</sup> the supreme court held that no action is properly commenced if either service of summons or the substance and content of the summons are not in compliance with the statutory mandate.<sup>221</sup> Also, in *Santopolo v. Turner Construction Co.*,<sup>222</sup> the appellate division reminded the bench and bar that failure to obtain leave of court to add a new party to an action may be waived and is not fatal, even

---

214. See N.Y. CPLR 205(a) (McKinney 1990 & Supp. 1992).

215. See Farrell, *Good Old Unreliable Service Under New York's "Nail and Mail" Statute*, N.Y. L.J., July 28, 1987, at 1.

216. See N.Y. CPLR 306-b(b) (McKinney 1990 & Supp. 1992).

217. 968 F.2d 1544 (2d Cir. 1992).

218. *Id.* at 1548.

219. OSCAR G. CHASE, ET AL., CPLR MANUAL § 3.13 (1986)

220. 191 A.D.2d 223, 594 N.Y.S.2d 242 (1st Dep't 1993).

221. *Id.* at 223, 594 N.Y.S.2d at 242.

222. 181 A.D.2d 429, 580 N.Y.S.2d 755 (1st Dep't 1992).

though such failure generally renders service on the new party a nullity.<sup>223</sup>

*C. Jurisdiction Under the Uniform Child Custody Jurisdiction Act*

In *Maureen S. v. Margaret S.*,<sup>224</sup> the appellate division, by Justice Miller, held that the family court properly invoked its emergency jurisdiction powers pursuant to the Uniform Child Custody Jurisdiction Act ("UCCJA").<sup>225</sup> The appellate division affirmed the family court's decision to temporarily modify a custody award of another state. The appellate division also considered a broader question of the appropriate communicative procedures provided for by the UCCJA, and how in this case the New York family court did not utilize them to their fullest.<sup>226</sup>

*D. Appearance and Waiver of Jurisdictional Defenses*

Several *Survey* articles have mentioned *Addesso v. Shemtob*.<sup>227</sup> That case held that defendants seeking to take advantage of jurisdictional challenges must rigidly abide by the requirements of CPLR 3211(e).<sup>228</sup> During the *Survey* year two appellate divisions reminded the bar that valid jurisdictional objections will be waived by failure to raise them properly.<sup>229</sup> In *Wiesener v. Avis Rent-A-Car, Inc.*,<sup>230</sup> the Appellate Division, First Department held that failure to assert a specific objection to long-arm jurisdiction in an answer barred the assertion in a motion for summary judgment.<sup>231</sup> The appellate division stated, "[d]efendant, in its answer, asserted only a defense predicated upon improper service, which it later conceded to be without merit."<sup>232</sup> Similarly in *Lauro v. Cronin*,<sup>233</sup> the Appellate Division, Third Department held that a personal jurisdiction defense of im-

---

223. *Id.* at 429, 580 N.Y.S.2d at 755.

224. 184 A.D.2d 159, 592 N.Y.S.2d 55 (2d Dep't 1992).

225. N.Y. DOM. REL. LAW § 75-d(1)(c)(ii) (McKinney 1988 & Supp. 1992).

226. *See Maureen S.*, 184 A.D.2d at 165, 592 N.Y.S.2d at 59.

227. 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987).

228. *See Carlisle, Civil Practice, 1989 Survey, supra* note 62, at 98-100.

229. *See Wiesener v. Avis Rent-A-Car, Inc.*, 182 A.D.2d 372, 582 N.Y.S.2d 122 (1st Dep't 1992); *Lauro v. Cronin*, 184 A.D.2d 837, 584 N.Y.S.2d 671 (3d Dep't 1992).

230. *Wiesener*, 182 A.D.2d at 372, 582 N.Y.S.2d at 122.

231. *Id.*

232. *Id.* at 373, 582 N.Y.S.2d at 122.

233. *Lauro*, 184 A.D.2d at 837, 584 N.Y.S.2d at 671.

proper service was waived where a pre-answer motion to dismiss did not include the defense.

### *E. Inter-American Convention on Letters Rogatory*

Prior *Survey* articles have discussed the Hague Convention and concluded that failure to comply with it will result in a dismissal of the plaintiff's action.<sup>234</sup> In *Torres v. Arocena*,<sup>235</sup> Justice Tompkins of the supreme court reminded the bench and bar that the United States is a signatory to the Inter-American Convention on Letters Rogatory and that failure to comply with the Convention's requirement that service of process abroad be made in accordance with the law of the state of destination preempts any inconsistent New York State service of process law.<sup>236</sup> The bottom line is if the defendant resides in a country that is a signatory to the Convention, the plaintiff must make service in that country. The mandatory language in the Inter-American Convention is comparable to that of the Hague Service Convention which was discussed in *Volkswagenwerk Aktiengesellschaft v. Schlunk*.<sup>237</sup>

## IV. DISCLOSURE CASES

During the *Survey* year, the Court of Appeals settled a conflict among the four appellate divisions and ruled that defense surveillance films made to undermine a plaintiff's personal injury claims must be disclosed.<sup>238</sup> The Court of Appeals for the Second Circuit ruled that client phone records are not protected from a government subpoena on privilege grounds,<sup>239</sup> and the Appellate Division, First Department held that law firm tax records are not discoverable after the firm breaks up.<sup>240</sup> Also, several lower courts issued interesting opinions regarding the attorney-client privilege.<sup>241</sup>

---

234. See Carlisle, *Civil Practice*, 1988 *Survey*, *supra* note 63, at 108-09.

235. 155 Misc. 2d 52, 587 N.Y.S.2d 495 (Sup. Ct. N.Y. Co. 1992).

236. *Torres*, 155 Misc. 2d at 52, 587 N.Y.S.2d at 495.

237. 486 U.S. 694 (1988).

238. See *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 604 N.E.2d 63, 590 N.Y.S.2d 1 (1992).

239. See *United States v. John Doe*, 959 F.2d 1158 (2d Cir. 1992).

240. *Gordon v. Grossman*, 183 A.D.2d 669, 584 N.Y.S.2d 54 (1st Dep't 1992).

241. See *infra* notes 254-60 and accompanying text.

*A. Disclosure of Videotapes Ordered*

In *DiMichel v. South Buffalo Railway Co.*,<sup>242</sup> the Appellate Division, Fourth Department held that a defendant must turn over any surveillance tapes it intends to use at trial. The Fourth Department reasoned that although the tapes were material prepared for litigation they were discoverable on a showing "that the party seeking discovery has a substantial need of the materials in preparation of the case and is unable . . . to obtain [their] substantial equivalent by other means."<sup>243</sup> The appellate division authorized qualified discovery. The Second Department reached a similar conclusion<sup>244</sup> and the Third Department ruled that the plaintiff could await the trial to challenge the authenticity of the surveillance materials.<sup>245</sup> The First Department held that surveillance materials were discoverable because they were statements of the plaintiff and available under CPLR Section 3101(e) during pre-trial inspection.<sup>246</sup>

A unanimous Court of Appeals, speaking through Chief Judge Wachtler, adopted the Fourth Department's rationale. Chief Judge Wachtler stated:

Having considered the different approaches, we agree with the Second, Third and Fourth Departments that surveillance films should be treated as material prepared in anticipation of litigation, and as such, are subject to a qualified privilege that can be overcome only by a factual showing of substantial need and undue hardship.<sup>247</sup>

Chief Judge Wachtler rejected defendant's argument that the plaintiff could tailor his testimony after viewing the surveillance material and noted that the material could be turned over after the plaintiff had been deposed.<sup>248</sup>

---

242. 80 N.Y.2d 184, 604 N.E.2d 63, 590 N.Y.S.2d 1 (1992).

243. See *DiMichel v. South Buffalo Ry. Co.*, 178 A.D.2d 914, 579 N.Y.S.2d 788 (4th Dep't 1991).

244. See *Kane v. Her Pet Refrigeration, Inc.*, 181 A.D.2d 257, 587 N.Y.S.2d 339 (2d Dep't 1992).

245. See *Careccia v. Enstron*, 174 A.D.2d 48, 578 N.Y.S.2d 678 (3d Dep't 1992).

246. *Marte v. Hickok Mfg. Co.*, 154 A.D.2d 173, 552 N.Y.S.2d 297 (1st Dep't 1990).

247. See *DiMichel*, 80 N.Y.2d at 196, 604 N.E.2d at 68, 590 N.Y.S.2d at 6.

248. *Id.* at 197, 604 N.E.2d at 68, 590 N.Y.S.2d at 6.

### *B. Client Phone Records Not Protected*

In *United States v. John Doe*,<sup>249</sup> the Court of Appeals for the Second Circuit held that telephone records given to a law firm by its client are not protected from subpoena provided that the subpoena is not drafted so as to reveal the firm's legal strategy.<sup>250</sup> The government had served a federal grand-jury subpoena that sought phone records from an unnamed client represented by the Manhattan law firm Paul, Weiss, Rifkind, Wharton & Garrison. The Court of Appeals ruled that the subpoena request did not violate the attorney work-product, attorney-client, or Fifth Amendment privileges of the client. Judge Amalya L. Kearse authored the opinion and was joined by Judge Jon O. Newman and retired U.S. Supreme Court Justice Thurgood Marshall in a unanimous opinion.

### *C. Law Firm Tax Records Not Available*

In *Gordon v. Grossman*,<sup>251</sup> the Appellate Division for the First Department reversed an order granting disclosure of a portion of defendant's income tax returns in an action arising from the termination of a law firm partnership.<sup>252</sup> The appellate division held that disclosure of tax returns is disfavored because of their confidential and private nature. The appellate division stressed that the party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources.<sup>253</sup>

### *D. Other Discovery Opinions*

In an apparent issue of first impression, Justice Silberman held that an attorney who is a close friend of one spouse, but does not represent her, is protected by the attorney-client privilege and cannot be required to testify as to conversations about business and financial concerns and how to proceed with the case.<sup>254</sup> Relying on the Court of Appeals decision in *In re Priest v. Hennessy*,<sup>255</sup> Justice Silberman

---

249. 959 F.2d 1158 (2d Cir. 1992).

250. *Id.* at 1158.

251. *Gordon*, 183 A.D.2d at 669, 584 N.Y.S.2d at 54.

252. *Id.*

253. *Id.*

254. *Nachman v. Nachman*, N.Y. L.J., Jan. 22, 1993, at 1 (Sup. Ct. N.Y. Co.).

255. 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980).

concluded in *Nachman v. Nachman*<sup>256</sup> that an attorney-client relationship could exist between the spouse and her attorney friend even though the latter perceived her role as one of an "adviser."<sup>257</sup> In another issue of first impression, Justice Harold L. Wood ruled that an attorney must either reveal his client's name or remain silent and risk going to jail.<sup>258</sup> Justice Wood ruled that even though the client faced possible criminal prosecution as a hit and run driver, the attorney-client privilege was not applicable.<sup>259</sup> His ruling goes beyond the Court of Appeals 1960 decision in *Matter of Kaplan*,<sup>260</sup> where the Court held the name of a client, whose lawyer had told authorities about the bribery of city officials, did not have to be revealed because the client feared reprisals.

## V. SANCTIONS

During the *Survey* year, New York courts have issued many opinions analyzing recently enacted sanction rules for civil litigation.<sup>261</sup> Of particular interest is Justice Lebedeff's decision in *In re Entertainment Partners Group Inc. v. Davis*,<sup>262</sup> which rejected the argument that the language of CPLR 8303-a limits the recovery of costs and attorney's fees to \$10,000 for an entire action. Also, *Guarnier v. American Dredging Co.*<sup>263</sup> should be noted because it is the first time the Court of Appeals reversed a lower court's imposition of Part 130 sanctions against an attorney.

### A. Background

In 1986 the Court of Appeals held, in *A.G. Ship Maintenance Corp. v. Lezak*,<sup>264</sup> that state courts do not have inherent power to impose sanctions on litigants and counsel. After *A.G. Ship*, the Legislature passed CPLR 8303-a which provides for costs upon frivolous claims in actions to recover damages for personal injury, injury to

---

256. *Nachman*, N.Y. L.J., Jan. 22, 1993, at 1.

257. *Id.*

258. *In re D'Alessio*, 155 Misc. 2d 518, 589 N.Y.S.2d 282 (Sup. Ct. Westchester Co. 1992).

259. *Id.* at 521, 589 N.Y.S.2d at 284.

260. *In re Kaplan*, 8 N.Y.2d 214, 168 N.E.2d, 660, 203 N.Y.S.2d 836 (1960).

261. See Carlisle, Judicial Seminars 1992 Legal Update on New York Civil Practice (outline containing all sanction cases) (on file at Barclay Library).

262. 155 Misc. 2d 894, 590 N.Y.S.2d 979 (Sup. Ct. N.Y. Co. 1992).

263. 79 N.Y.2d 846, 588 N.E.2d 92, 580 N.Y.S.2d 194 (1992).

264. 69 N.Y.2d 1, 503 N.E.2d 681, 511 N.Y.S.2d 216 (1986).

property or wrongful death actions.<sup>265</sup> The statute contemplates a \$10,000 monetary cap for each action.<sup>266</sup> In 1989, Part 130 of the Rules of the Chief Administrator of the Courts became effective.<sup>267</sup> These rules, which apply to most New York State courts, permit the court at its discretion to sanction any party or attorney in any civil action or proceeding for frivolous conduct by imposing costs and reasonable attorney fees.<sup>268</sup> In addition to, or in lieu of awarding costs and fees to the other side, the court may, at its discretion, impose financial sanctions upon any party or attorney for frivolous conduct.<sup>269</sup>

Payments of sanctions by an attorney are deposited with the Clients' Security Fund.<sup>270</sup> Payment of sanctions by a party who is not an attorney are deposited with the clerk of the court for transmittal to the State Commissioner of Taxation and Finance.<sup>271</sup> An award for costs and fees or sanctions may be sought by motion or by cross-motion, or may be made by the court *sua sponte*.<sup>272</sup> Part 130-1.2 provides that an award of costs or an imposition of sanctions, or both, can be granted only upon a written decision setting forth the conduct on which the award or imposition is based.<sup>273</sup> The decision must state the reasons why the court found the amount awarded or imposed to be appropriate.<sup>274</sup>

Conduct is frivolous if: "(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."<sup>275</sup> Part 130 also directs that when determining whether the conduct undertaken was frivolous, the court shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued

---

265. See N.Y. CPLR 8303-a (McKinney Supp. 1993).

266. See N.Y. CPLR 8303-a(a).

267. See 22 NYCRR 130-1.1 (1989).

268. See *id.*

269. See *id.*

270. *Id.*

271. See *id.*

272. See 22 NYCRR 130-1.1(d).

273. See *id.* § 130-1.2.

274. See *id.*

275. *Id.* § 130-1.1(c)(1), (2).

when its lack of legal or factual basis was apparent or should have been apparent to counsel.”<sup>276</sup> An award of costs or the imposition of sanctions, or both, shall be entered as a judgment of the court.<sup>277</sup> The total amount of costs awarded and sanctions imposed must not exceed \$10,000 in any action or proceeding.<sup>278</sup>

*B. Guarnier v. American Dredging Co.*

In *Guarnier v. American Dredging Co.*,<sup>279</sup> the Supreme Court for New York County imposed Part 130 sanctions on defendant’s counsel *sua sponte* in the amount of \$5,000.<sup>280</sup> The trial judge had encountered difficulty in compelling one of the jurors to serve because of his fears that jury service would put his employment at risk.<sup>281</sup> The court persuaded the juror to appear and he was seated with the panel to be sworn *en banc*.<sup>282</sup> “At this juncture the court inquired of counsel individually whether the jury was satisfactory.”<sup>283</sup> Defendant’s counsel responded that he did not think the juror should be forced to sit on the jury.<sup>284</sup> The court excused the jury and informed defendant’s counsel that costs would be assessed against him for plaintiff’s counsel’s time.<sup>285</sup>

The supreme court later issued its written decision addressing defense counsel’s conduct at the voir dire and concluded that the form of counsel’s objection was an improper attempt to curry favor with the juror.<sup>286</sup> The Appellate Division for the First Department recognized that the supreme court’s assessment of costs in the amount of \$5,000 was not supported by a hearing mandated by the sanction rules or by any specific findings of fact, but affirmed and reduced the amount to \$1,000.<sup>287</sup> The Court of Appeals reversed on the grounds that “the reviewable record of the conduct of the appellant attorney during jury selection, which prompted the imposition of the sanction

---

276. *Id.* § 130-1.1(c)(2).

277. *See* 22 NYCRR 130-1.2.

278. *See id.*

279. 79 N.Y.2d 846, 588 N.E.2d 92, 580 N.Y.S.2d 194 (1992).

280. *See* *Guarnier v. American Dredging Co.*, 172 A.D.2d 220, 567 N.Y.S.2d 725 (1st Dep’t 1991).

281. *Id.* at 220, 567 N.Y.S.2d at 725.

282. *See id.* at 221, 567 N.Y.S.2d at 726.

283. *Id.*

284. *Id.*

285. *Guarnier*, 172 A.D.2d at 221, 567 N.Y.S.2d at 726.

286. *Id.*

287. 179 A.D.2d 392, 577 N.Y.S.2d 842 (1st Dep’t 1992).

over two months later, [was] devoid of the required basis for concluding that the conduct . . . was 'frivolous' within the meaning of the sanctions rule."<sup>288</sup>

*C. Entertainment Partners Group, Inc. v. Davis*

*Entertainment Partners Group, Inc. v. Davis*<sup>289</sup> raised an issue of first impression: Does the \$10,000 specified in CPLR 8303-a<sup>290</sup> apply to the case as a whole, or does it permit higher total costs in a case?<sup>291</sup> Justice Lebedeff held that the plain meaning of CPLR 8303-a permits, but does not necessarily require, that the \$10,000 maximum apply to each prevailing party.<sup>292</sup> She also found the statutory language permits consideration of a higher award to a given party for it supports a cost award even upon a "claim" and a number of claims may be raised against an individual party.<sup>293</sup> Justice Lebedeff stated:

Had the legislature not intended to allow consideration of costs as to multiple prevailing parties and multiple claims, even if the total were in excess of \$10,000, the language would have addressed costs in the entire case, as is done in the text of the costs provisions in real property actions and in difficult or complex cases, which address additional costs only on the entire 'action' (CPLR §§ 8302 and 8303), and in the sanctions provision of NYCRR 130-1.2 of the Rules of the Chief Judge, which contains reference to a maximum amount of \$10,000 in a single case.<sup>294</sup>

The Lebedeff scheme would allow a judge to impose a one million dollar sanction on a plaintiff who had frivolously filed a complaint with ten claims against ten defendants. This result seems incompatible with the legislative purpose of CPLR 8303-a.<sup>295</sup>

## VI. THE LEGAL PROFESSION

During the *Survey* year, the Court of Appeals issued important opinions regarding the liability of law firms to third parties and to

---

288. *Guarnier*, 79 N.Y.2d at 846, 602 N.E.2d at 232, 580 N.Y.S.2d at 194.

289. 155 Misc. 2d 894, 590 N.Y.S.2d 979 (Sup. Ct. N.Y. Co. 1992).

290. N.Y. CPLR 8303-a(a) (McKinney 1990 & Supp. 1992).

291. *See Entertainment Partners*, 155 Misc. 2d at 895-96, 590 N.Y.S.2d at 980.

292. *Id.* at 901, 590 N.Y.S.2d at 984.

293. *Id.*

294. *Id.* at 901, 590 N.Y.S.2d at 984.

295. *See* N.Y. CPLR 8303-a.

former associates.<sup>296</sup>

### A. *Liability of Law Firms to Third Parties*

In *Prudential Insurance Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*,<sup>297</sup> the Court of Appeals ruled for the first time that lawyers may be liable to third parties for negligent representation "in the right circumstances."<sup>298</sup> Pursuant to its client's instructions, a defendant law firm furnished to a third party (Prudential) an opinion letter that assertedly contained false assurances. The firm had erroneously stated the outstanding balance on a first preferred fleet mortgage securing the debt as \$92,885 rather than the correct sum of \$92,885,000.<sup>299</sup> As a result Prudential (the plaintiff) suffered significant losses and sued the law firm, contending that the firm's opinion letter had falsely assured it that the mortgage documents in question would fully protect its existing \$92,885,000 security interest.<sup>300</sup> Prudential acknowledged that it was not in privity with the law firm but argued that the relationship between them was sufficiently close so as to support a cause of action in negligence.<sup>301</sup> Alternatively, it maintained that the firm could be held liable to it, in contract, on a third party beneficiary theory.<sup>302</sup> The Court of Appeals, speaking through Judge Titone, stated, "[w]hile a law firm supplying such a letter may have a duty running to the third parties, the record in this case does not support the conclusion that the assertion in the opinion letter caused plaintiff's loss."<sup>303</sup> The *Prudential Insurance Co.* case should alert lawyers and law firms to the fact that they may be held liable for economic injury arising from negligent representation to third parties.

### B. *Liability of Law Firms to Former Associates*

In *Wieder v. Skala*,<sup>304</sup> the Court of Appeals, in an issue of first impression, reversed the lower courts and held that the plaintiff had

---

296. See *infra* notes 297-311 and accompanying text.

297. 80 N.Y.2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992).

298. *Prudential Ins.*, 80 N.Y.2d at 382, 605 N.E.2d at 320, 590 N.Y.S.2d at 833.

299. See *id.* at 380, 605 N.E.2d at 319, 590 N.Y.S.2d at 832.

300. See *id.*

301. See *id.* at 381, 605 N.E.2d at 319-20, 590 N.Y.S.2d at 832-33.

302. See *id.* at 381, 605 N.E.2d at 320, 590 N.Y.S.2d at 833.

303. *Prudential Ins.*, 80 N.Y.2d at 379, 605 N.E.2d at 319, 590 N.Y.S.2d at 832.

304. 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992).

stated a claim for relief either for breach of contract or for the tort of wrongful discharge. Plaintiff alleged he was fired by the defendant law firm for asking the firm partners to report another associate's misconduct to the Appellate Division Disciplinary Committee as required under DR 1-103(A) of the Code of Professional Responsibility.<sup>305</sup> The Court of Appeals rejected the argument that plaintiff failed to state a cause of action because, as an at-will employee, the firm could terminate him without cause. The Court stressed that, in any hiring of an attorney as an associate to practice law with a law firm, there is implied an understanding that both parties will conduct the practice in accordance with the ethical standards of the profession.<sup>306</sup> The Court noted that the plaintiff's failure to comply with DR 1-103(A) could result in suspension or disbarment.<sup>307</sup> Thus, the defendant law firm, by insisting that plaintiff disregard the disciplinary rule, placed the plaintiff in the position of having to choose between continued employment and his own potential suspension and disbarment.<sup>308</sup> The Court found this made the relationship of an associate to a law firm employer intrinsically different from that of employees in the ordinary "at-will" case.<sup>309</sup>

The Court of Appeals also rejected plaintiff's argument that the decision in *Cohen v. Lord, Day & Lord*<sup>310</sup> warranted a recognition of the tort of abusive discharge.<sup>311</sup> The bottom line in *Wieder* is that law firms must be careful not to ignore whistleblowing associates.

## VIII. MOTION PRACTICE AND VENUE

### A. Motion to Reargue

In *Pahl Equipment Corp. v Kassis*,<sup>312</sup> the Appellate Division, First Department clarified the standards litigants should follow when filing motions for leave to renew and to reargue in trial courts. The appellate division stressed that a motion for leave to reargue pursuant

---

305. See N.Y. DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1993).

306. See *Wieder*, 80 N.Y.2d at 636, 609 N.E.2d at 108, 593 N.Y.S.2d at 752.

307. See *id.* at 636-37, 609 N.E.2d at 109, 593 N.Y.S.2d at 756.

308. See *id.*

309. See *id.* at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757.

310. 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989).

311. See *Wieder*, 80 N.Y.2d at 638-39, 609 N.E.2d 110, 593 N.Y.S.2d at 757.

312. 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dep't 1992).

to CPLR 2221<sup>313</sup> "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'"<sup>314</sup> The appellate division warned advocates not to seek reargument merely to relitigate issues previously decided or to present arguments different from those originally asserted.<sup>315</sup> The appellate division also reminded the bar that a motion to renew under CPLR 2221 is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention.<sup>316</sup> Finally, the appellate division pointed out that sanctions could be applied under Part 130 of the Uniform Rules against any litigant who fails to comply with CPLR 2221 and then imposed sanctions of \$3,341.30 on plaintiffs to cover costs and expenses incurred in opposing their motion to renew and reargue.<sup>317</sup>

### B. Venue

Two appellate division decisions remind the bench and bar that some personal injury actions should not be tried in Bronx County.<sup>318</sup> In *Johnson v. Greater New York Conference of Seventh Day Adventist Church*,<sup>319</sup> plaintiffs elected to try their personal injury action in Bronx County.<sup>320</sup> The appellate division ruled that even though the accident occurred there, venue was improper because neither party resided in the Bronx.<sup>321</sup> The court also rejected a motion to retain venue in the Bronx on the grounds that justice would be promoted because the plaintiffs failed to supply the names, addresses, and occu-

---

313. See N.Y. CPLR 2221 (McKinney 1991 & Supp. 1992).

314. *Kassis*, 182 A.D.2d at 27, 588 N.Y.S.2d at 11 (citing *Schneider v. Solowey*, 141 A.D.2d 813, 529 N.Y.S.2d 1017 (2d Dep't 1988)).

315. See *id.*

316. See *id.* (citing *Beiny v. Wynward*, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dep't 1987), *appeal dismissed*, 71 N.Y.2d 994, 524 N.E.2d 879, 529 N.Y.S.2d 277 (1988)).

317. *Id.* at 33, 588 N.Y.S.2d at 14.

318. See *Johnson v. Greater N.Y. Conference of Seventh Day Adventist Church*, 181 A.D.2d 862, 581 N.Y.S.2d 414 (2d Dep't 1992); *Delia v. Winter Bros., Inc.*, 183 A.D.2d 1006, 583 N.Y.S.2d 591 (3d Dep't 1992).

319. *Johnson*, 181 A.D.2d at 862, 581 N.Y.S.2d at 414.

320. *Id.* at 863, 581 N.Y.S.2d at 415.

321. *Id.*

pations of the witnesses whose convenience would be effected.<sup>322</sup>

In *Delia v. Winter Brothers, Inc.*,<sup>323</sup> the plaintiff venued a wrongful death action in Bronx County even though the accident occurred in Rockland County.<sup>324</sup> The plaintiff argued that venue was placed in the Bronx because the defendant purportedly resided there.<sup>325</sup> The supreme court had granted a motion to change venue based on an affidavit submitted by the defendant which asserted his business address was in the Bronx, but he resided in Rockland County.<sup>326</sup>

### CONCLUSION

I am grateful for the helpful comments and suggestions from my colleagues of the bench and bar and in academia. I am particularly grateful to students in the 1993 graduating classes of Pace University School of Law and New York Law School for keeping me alert to new developments in New York Civil Practice. I also wish to express my sincere appreciation to the editors and members of the Syracuse Law Review for their patience and assistance.

---

322. *Id.*

323. 183 A.D.2d 1006, 583 N.Y.S.2d 591 (3d Dep't 1992).

324. *Delia*, 183 A.D.2d at 1006, 583 N.Y.S.2d at 591.

325. *Id.* at 1007, 583 N.Y.S.2d at 591.

326. *Id.* at 1006, 583 N.Y.S.2d at 591.